

Mackenzie District Council

Plan Change 13 (Mackenzie Basin) – Mackenzie District Plan

Section 293 Package

Section 32 Report

(27 May 2016)

1. INTRODUCTION

The Environment Court has directed Mackenzie District Council (**Council**) to prepare a package of changes to Plan Change 13 (**PC13**) to the Operative Mackenzie District Plan (**Operative Plan**). This direction was made under section 293 of the Resource Management Act 1991 (**RMA**) and follows a series of decisions by both the Environment Court and the High Court where various aspects of PC13 have been considered.

This report contains an assessment of the aspects of PC13 which Council proposes to modify and the new provisions it proposes to include in PC13, in accordance with the Environment Court's (**Court**) directions (**S293 Package**). This assessment has been undertaken in accordance with the requirements of section 32 of the RMA which applied at the time PC13 was first notified in December 2007. These requirements are:

“...

(3) *An evaluation must examine:*

(a) *The extent to which each objective is the most appropriate way to achieve the purpose of this Act; and*

(b) *Whether, having regard to efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.*

(4) *For the purpose of the examinations referred to in subsections (3) and (3A), an evaluation must take into account:*

(a) *the benefits and costs of policies, rules and other methods;*

(b) *the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.*

...”

In November 2015 the Council provisionally approved the Section 293 Package amending Plan Change 13. Since that time the Package has been publicly notified and 30 submissions received. After consultation with the parties the Council has gained a better understanding of the concerns about, and support for, the Package. The Council has amended the Package to address issues raised in submissions and during consultation. The updated Package is now to be lodged with the Environment Court. The main changes that the Council has made to the Package are:

- To generally replace the term *visual vulnerability* with the broader term *landscape sensitivity*, which includes both visual sensitivity and sensitivity of landscape character. This requires changes to **Policy 3B1 – Recognition of the Mackenzie Basin’s distinctive characteristics** and its explanations. The map identifying high, medium and low visual vulnerability areas throughout the Basin (Area of Landscape Management) and all references to this map are removed from the s293 Package.
- Inclusion of an overlay in the Planning Maps identifying the Scenic Grasslands.
- To discourage non-farm buildings outside of Farm Base Areas, the activity status for non-farm buildings within Farm Base Areas has been reduced from Restricted Discretionary to Controlled.
- To simplify the assessment of farm buildings outside of Farm Base Areas, all of these buildings now have Restricted Discretionary Activity status with no reference to visual vulnerability classification.
- Fences no longer require resource consent within Scenic Viewing areas, Scenic Grasslands or Lakeside Protection Areas.
- Due to difficulty in defining what constitutes a “large” irrigator, the rules controlling irrigators in sensitive areas and requiring setbacks from the tourist roads simply refer to “irrigators”.
- The potential benefits for the Basin environment from covenants initiated by the Mackenzie Country Trust are acknowledged in **Policy 3B13 – Pastoral Intensification** as a matter of consideration in assessing application for pastoral intensification.

This section 32 report has been amended to take into account the changes in the s293 Package.

2. BACKGROUND/HISTORY

PC13 was initiated by Council in 2007. The primary purpose of this Plan Change was to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, development and use as required by section 6(b) of RMA. To achieve this, greater acknowledgement of the outstanding natural landscapes and features within the District was provided through proposed objectives, policies and rules relating particularly to the Mackenzie Basin. For this purpose, the Mackenzie Basin Subzone was created as a subzone of the main Rural Zone, which applies throughout the District.

When PC13 was publicly notified in December 2007, it was accompanied by a section 32 report. In relation to the protection of the outstanding natural landscape values of the Mackenzie Basin, that report:

- Provided details of the development pressure within the Mackenzie Basin, and in particular, pressure for residential development and subdivision, and Council’s proposed response to this;
- Listed the various consultation undertaken and documents considered by Council in developing PC13;
- Assessed proposed new Objectives 3A *Outstanding Landscapes* and 3B *Landscape Values*; and
- Assessed proposed new Policies 3A through to 3O in terms of their efficiency and effectiveness.

The Court has subsequently undertaken section 32 assessments of a proposed new subordinate Objective 3B(3) and new policies relating to the following matters:

- Restricting the location of houses to the existing townships and Farm Base Areas;
- The need to recognise the particular role and importance of the Waitaki Power Scheme within the Mackenzie Basin; and
- High intensity irrigation.

These assessments are **attached** to this Report as **Attachment A**. They should be considered together with this Report to obtain a full understanding of the options considered by the Council in planning for the protection of the outstanding natural landscape of the Mackenzie Basin from inappropriate subdivision, use and development as required by section 6(b) of the RMA.

3. SCOPE OF SECTION 32 ASSESSMENT

This section 32 assessment evaluates the changes to PC13 now proposed by the Council in accordance with the Court's directions.

In terms of the scope of that assessment, in its Ninth (Procedural) Decision the Court held:

"...the section 32 report only has to cover matters to the extent that the Council's proposed objective(s) and policies differ significantly from those in PC13 i.e. as notified or as suggested, tentatively, by the Environment Court..."¹

The Court indicated further that if the Council wished to adopt the Court's suggested approach to objectives and policies then it could rely on the reasons given for these approaches contained in the First and subsequent decisions of the Court.²

The Court indicated in its decisions, and in particular the First (Interim) decision (**First Decision**), that it considered the decision of the Council on PC13 (i.e. decision on submissions) was moving in the wrong direction by being more liberal in the way it managed farm buildings and subdivision. It was also concerned that PC13 did not address the greening of the Basin. The Court accordingly preferred the notified version of PC13. It did however make the strong point that activities such as more intensive pastoral farming needed to be managed as they had real potential to compromise the outstanding natural landscape of the Basin. As there is a section 32 report for the notified version of PC13 and because the Court has carried out its own section 32 assessments for its suggested provisions, the Court has concluded that only changes that go beyond these two touchstones require additional assessment.

On this basis, this Report provides an assessment of the following matters under section 32 of the RMA:

- A new subordinate Objective 3B(3), which deals with pastoral farming, pastoral intensification and rural residential subdivision, cluster housing and farm buildings around homesteads (i.e. Farm Base Areas);
- Policies and rules which support Objective 3B(3) Farm buildings and other buildings;

¹ [2014] NZEnvC 246, at [35].

² Ninth Decision [36].

- Policies and rules regarding the identification and protection of Scenic Grasslands/tussock grasslands and greater protection of Scenic Viewing Areas and Lakeside Protection Areas;
- Policies and Rules regarding the management of pastoral intensification; and
- Policies and Rules regarding subdivision outside Farm Base Areas.

4. OBJECTIVES

The only change to the PC13 objectives proposed in the Section 293 Package relates to the Court's suggested wording of a new subordinate **Rural Objective 3B(3) - Activities in the Mackenzie Basin's outstanding natural landscape**.

The assessment provided in clause 4.1 below evaluates whether the subordinate Objective 3B(3) is the most appropriate objective to achieve the purpose of the RMA as contained in section 5 of the Act. This purpose is the promotion of the sustainable management of natural and physical resources. The term *sustainable management* is then further defined as:

*In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.*³

4.1 OBJECTIVE 3B(3)

To provide a better focus for the most important landscapes in the District, when PC13 was first prepared, Council decided to split **Objective 3 Landscape Values** into two objectives. The original (operative) Objective 3 stated:

Objective 3 Landscape Values

Protection of outstanding landscape values, the natural character of the margins of lakes and rivers and wetlands and of those processes and elements which contribute to the District's overall character and amenity.

The two objectives that came from this and were contained in PC13 as notified were firstly Objective 3A, which focused on outstanding natural landscape and features, and secondly, Objective 3B, which dealt with landscape values in a more general sense. These Objectives are set out below:

Objective 3A Outstanding Landscapes

To protect and sustain the outstanding natural landscapes and features of the District for present and future generations.

³ RMA Section 5(2).

Objective 3B Landscape Values

Protection of the natural character of the landscape and margins of lakes and rivers and wetlands and of those processes and elements which contribute to the District's overall character and amenity.

After consulting with Council, the Court made a final determination in its Eighth (Procedural) Decision that Objective 3A should largely return to its original wording (i.e. Objective 3 – Landscape Values in the Operative Plan).⁴ That Objective deals with all landscape values including outstanding natural landscapes and applies to the whole District.

However, in the First Decision, the Court discussed the need for a more detailed and less general objective for the Mackenzie Basin. It stated that this objective should require protection and enhancement of the outstanding natural landscape and then specify the attributes of the Basin which contribute to it being an outstanding natural landscape. The objective was then to provide a specific exception for the existing Waitaki Power Scheme which is an integral part of the Basin. This approach was intended to provide the Council and the community with positive guidance in refining PC13 through the s293 process including changes arising out of public consultation on the section 293 package.

The wording of the new Objective 3B(1) and (2), as confirmed by the Court, is as follows:⁵

Objective 3B – Activities in the Mackenzie Basin's outstanding natural landscape

- (1) *Subject to (2)(a), to protect and enhance the outstanding natural landscape of the Mackenzie Basin subzone in particular the following characteristics and/or values:*
- (a) *the openness and vastness of the landscape;*
 - (b) *the tussock grasslands;*
 - (c) *the lack of houses and other structures;*
 - (d) *residential development limited to small areas in clusters;*
 - (e) *the form of the mountains, hills and moraines, encircling and/or located in, the Mackenzie Basin;*
 - (f) *undeveloped lakesides and State Highway 8 roadside;*
- (2) *To maintain and develop structures and works for the Waitaki Power Scheme:*
- (a) *within the existing footprints of the Tekapo-Pukaki and Ohau Canal Corridor, the Tekapo, Pukaki and Ohau Rivers, along the existing transmission lines, and in the Crown-owned land containing Lake Tekapo, Pukaki, Ruataniwha and Ohau and subject only (in respect of landscape values) to the objectives, policies and methods of implementation within Chapter 15 (Utilities) except for management of exotic tree species in respect of which all of objective (1) and all implementing policies and methods in this section apply;*
 - (b) *elsewhere within the Mackenzie Basin subzone so as to achieve objective (1) above*

In its First Decision, the Court suggested that there could be a further subordinate Objective 3B(3) dealing with the specific matters of enabling pastoral farming, enabling pastoral intensification in specific areas and enabling rural residential development and cluster housing and farm buildings in Farm Base Areas and low visual vulnerability areas. The Court's suggested wording of the subordinate Objective is set out in the Table below.

⁴ [2013] NZEnvC 304, Order 8B.

⁵ Eighth (Procedural) Decision, Order 8C.

Council has considered the Court's suggested wording of Objective 3B(3), and decided for consultation purposes to include it in the Section 293 package but with some important changes. It is these changes that require assessment as to whether they are the most appropriate way to achieve the purpose of the Act. Set out below is a table which shows the differences between the Court's and Council's versions of the proposed new subordinate Objective 3B(3):

Environment Court Objective 3B(3)	Council - s293 Package Objective 3B(3)
Subject to objective (1) above and rural objective 1,2 and 4	Subject to objective (1) above and rural objective 1,2 and 4
(a) <i>to enable pastoral farming while limiting building, fencing and shelterbelts</i>	(a) to enable pastoral farming
(b) <i>to enable pastoral intensification cultivation and/or direct drilling and high intensity (irrigated) farming in appropriate areas south and east of SH8 except adjacent to, and in the foreground of views from, State Highways and tourist roads;</i>	(b) to enable pastoral intensification, including cultivation and/or direct drilling and high intensity (irrigated) farming, in Farm Base Areas and in areas for which irrigation consent was granted prior to 14 November 2015 and the effects on the outstanding natural landscape have been addressed through the regional consenting process; and elsewhere, to manage pastoral intensification.
(c) <i>to enable rural residential subdivision, cluster housing and farm buildings preferably around existing homesteads (where they are outside hazard areas) or in the areas of low visual vulnerability shown on map z in the district plan.</i>	(c) to enable rural residential subdivision, cluster housing and farm buildings around existing homesteads (where they are outside hazard areas).

Objective 3B(3)(a): In Council's proposed version of 3B(3)(a), the qualification relating to fencing, buildings and shelterbelts has been removed. This was done to reflect the fact that there is no general limitation on fencing in the Operative Plan and shelterbelts are provided for but with some setback requirements. It is considered that Council's version more accurately reflects the current Plan controls, and is the most appropriate means of achieving the purpose of the RMA.

Objective 3B(3)(b): Council's proposed changes to 3B(3)(b) are more significant. The Court suggested that pastoral intensification should be enabled in appropriate areas to the south and east of SH8 except where they are adjacent to and in the foreground of views from the State Highway and tourist roads. This option was considered by Council but not adopted for the following reasons.

Firstly there are areas beyond the immediate view from SH8 and Haldon Road where conversion to dairying and other forms of pastoral intensification would have a significant impact on the values of the outstanding natural landscape. This is the conclusion drawn in the assessment of Graham Densem in his report *Intensification and Outstanding Natural Landscape: Landscape Management of the Mackenzie Basin in the Light of Court Decisions*⁶. Further a desktop assessment of ecological values in this area (to the south and east of SH8) commissioned by Council indicated a significant presence of threatened and at risk indigenous vegetation species⁷.

⁶ Intensification and Outstanding Natural Landscape: Landscape Management of the Mackenzie Basin in the Light of Court Decisions; Graham Densem, November 2015.

⁷ Mackenzie Basin (south and east of State Highway 8) Rapid Desktop Assessment, Mike Harding, 2nd July 2015.

Based on these expert assessments, Council considered the Court's suggested version of 3B(3)(b) was unlikely to achieve Operative **Rural Objective 1 Indigenous Ecosystems, Vegetation and Habitat** which requires safeguarding:

...indigenous biodiversity and ecosystem functioning through the protection and enhancement of significant indigenous vegetation and habitats, riparian margins and the maintenance of natural biological and physical processes.

Further, Operative Rural **Policy 1C - Natural Character and Ecosystem Functions** seeks to avoid, remedy or mitigate adverse effects on the natural character and indigenous land and water ecosystem functions of the District, including retaining areas of significant indigenous vegetation and habitat, and linkages between these areas. This policy addresses areas which have important indigenous vegetation values but are not within identified Sites of Natural Significance.

Council considers that to permit all pastoral intensification in these areas, and therefore remove any ability to assess the impacts of such intensification on indigenous vegetation, would be contrary to Rural Objective 1 and Policy 1C. In addition, it would not be the most appropriate means of achieving the purpose of the RMA, which includes safeguarding the life-supporting capacity of ecosystems and avoiding, remedying or mitigating adverse effects of activities on the environment.

The alternative version Council has included in the s293 Package provides for some pastoral intensification but not on an area-wide basis. Rather it enables pastoral intensification of land in Farm Base Areas and land for which water permits to take and use water for the purpose of irrigation have been granted by Environment Canterbury as at the date of public notification of the section 293 package. As a matter of fairness, it is considered unreasonable for landowners who have gone through a drawn out consenting process at considerable expense to obtain the right to take and use water for irrigation for intensification of production to then be prevented from proceeding by the District Plan. Further, Council proposes that in order to come within this exemption from pastoral intensification control, the impacts of the irrigated pasture on the outstanding natural landscape must have been taken into account during the regional consenting process. In most cases, the regional consents include conditions requiring setbacks for irrigation and irrigation structures from roads, thereby retaining at least in the foregrounds, views to and across the dry grasslands of the Basin.

It is also noted that there are other objectives, and supporting policies, in the Operative Plan which are relevant to protecting landscape values in the Basin. The most relevant are **Rural Objective 1 Indigenous Ecosystems, Vegetation and Habitat** (set out above) and the following Objective 4 and Policy 4B concerning the High Country:

Rural Objective 4 - High Country Land

To encourage land use activities which sustain or enhance the soil, water and ecosystem functions and natural values of the high country and which protect the outstanding landscape values of the high country, its indigenous plant cover and those natural processes which contribute to its overall character and amenity.

Rural Policy 4B - Ecosystem Functioning, Natural Character and Open Space Values

Activities should ensure that overall ecosystem functioning, natural character and open space values of the high country are maintained by:

- *Retaining as far as possible, indigenous vegetation and habitat*
- *Maintaining natural landforms*
- *Avoiding, remedying, or mitigating adverse effects on landscape and visual amenity.*

Managing the location and form of pastoral intensification, and in particular conversions to dairying, is necessary if the integrity of the high country is to be maintained and if the natural character, ecosystems and open space values are to be retained.

It is considered that the Council's proposed version of 3B(3)(b) is therefore more appropriate in meeting the purposes of the RMA and relevant Rural Zone objectives because it requires pastoral intensification proposals to be assessed through the resource consent process. In this way pastoral intensification which could seriously compromise biodiversity and /or values of the outstanding natural landscape can be avoided. Further the rule provides for some pastoral intensification where water has already been allocated and irrigation has been limited to areas where there will be less impact on landscape values. This approach also recognises that sustainable management has a component of providing for people and communities' economic well-being.

Objective 3B(3)(c): The third element of this subordinate objective relates to enabling rural residential subdivision, cluster housing and farm buildings. In the Court's version, these activities were to be enabled both around existing homesteads and in areas identified as low visual vulnerability. The Court's reference to "around existing homesteads" is referring to the Farm Base Areas that have been defined through PC13.

Council's alternative version of clause (c) removes reference to cluster housing and rural residential development being suitable within low visual vulnerability areas. This was done on the basis of Graham Densem's Report⁸ which concludes that rural residential subdivision, that is, subdivision for residential purposes within the Basin, is considered to be at odds with maintaining the extensive high country character, which is one of large open areas with occasional nodes containing buildings. This contrasts with lowland areas where properties are more closely and regularly "subdivided" by fencing, buildings, shelterbelts, cultivated paddocks etc. Low visual vulnerability areas have greater potential than medium or high visual vulnerability areas to accommodate well-sited buildings. Rural residential subdivision however, is different to buildings as it covers a larger area and normally involves a number of outbuildings as well as the residential dwellings, and typically has fencing of a style not typical of the high country. In addition, rural residential subdivision often involves multiple lots and so its visual impact is greater. For these reasons, there is real potential for this form of subdivision to adversely affect the character of the outstanding natural landscape.

It is considered that the only area where cluster housing and rural residential development can occur in the Basin without unduly impacting the values of the outstanding natural landscape is within existing Farm Base Areas.

For these reasons it is considered that the alternative version of 3B(3)(c) proposed by Council is more appropriate in terms of achieving the purpose of the RMA.

⁸ Intensification and Outstanding Natural Landscape: Landscape Management of the Mackenzie Basin in the Light of Court Decisions; Graham Densem, November 2015

5 POLICIES, RULES AND OTHER METHODS

Section 32 requires policies, rules and other methods proposed in plans to be evaluated in terms of whether they are the *most appropriate for achieving the objectives*. In doing so, costs and benefits are to be considered as well as the efficiency and effectiveness of these means in achieving objectives.

The policies and rules included in the Section 293 Package which differ from PC13 as publicly notified and from the suggestions made by the Court in its First Decision relate to:

- Those which support Objective 3B(3) Farm buildings and other buildings;
- Identification and protection of Scenic Grasslands/tussock grasslands and greater protection of Scenic Viewing Areas and Lakeside Protection Areas;
- Management of pastoral intensification; and
- Subdivision outside Farm Base Areas.

These policies and rules are evaluated below.

5.1 BUILDINGS AND SUBDIVISION

As detailed in the Section 293 Package, Council's proposed policies and rules relating to buildings and subdivision within the Mackenzie Basin generally reflect those suggested by the Court in its various decisions, and in particular its First Decision. However, to achieve a more cohesive set of policies and to avoid overlap between the policies where possible, these policies have been rewritten and reordered. Policy 3B2 – Subdivision and Building Development (derived from Environment Court Policies 3B3, 3B4 and 3B14) provides the basis for managing buildings within the Basin and specifies that:

- Farm Base Areas are to be the primary location for all buildings.
- Farm buildings are permitted within Farm Base Areas, subject to standards, and outside Farm Base Areas, are to be managed in terms of their impacts on the landscape and environmental values based on the visual sensitivity of the landscape to development.
- New residential or rural residential development should occur in Farm Base Areas or if beyond Farm Base Areas, only in lesser landscape sensitivity and then only by way of formal plan change creating a new zone.

As a consequence of the approach suggested by the Court, it has been necessary to return to the original definition of farm building contained in PC13 as notified, that is farm buildings must relate to farm activities and do not include houses or buildings used for accommodation. To avoid any ambiguity the definition now specifically states that dwellings and buildings for residential use are not included in the definition of farm building. To avoid confusion the definition of farm building also includes buildings used for factory farming and dairying as these terms are separately defined. The distinction between farm and non-farm buildings is necessary in order to provide for more liberal provisions for farm buildings. This is considered necessary if general farming activities are to be enabled within the Basin.

Three changes to the PC13 provisions are proposed in the Section 293 Package which differ from the Court's suggestions and PC13 as notified. All three of these changes have been further amended following consultation. Before addressing those changes, it is necessary to outline the Council's proposed refinements to Policy 3B1 to address matters raised in submissions and during consultation.

Policy 3B1 – Recognition of the Mackenzie Basin's distinctive characteristics has the purpose of recognising that while the Basin as a whole is an outstanding natural landscape, it contains a diversity of landforms, vegetation and natural character. This diversity is an expression of geological processes, altitude, climate (particularly rainfall) and human occupation. This diversity results in differing abilities for the landscape to absorb change and development. The policy in its original (i.e. notified) form relied, in part, on identification of three categories of visual vulnerability within the Basin, namely high, medium and low. Although the classifications were only referred to in rules relating to farm buildings and in some policies in a more general way, it became apparent from submissions and during consultation that the identification of these areas on the map "Areas of Landscape Management" created a level of confusion and concern amongst landowners.

Council also received submissions on the limitations of only using **visual** vulnerability/sensitivity in assessing the values of areas within the Basin and their sensitivity to change and development as this is limited to assessing a site as it is viewed from beyond the site. The inherent landscape character of an area which comprises landforms and natural processes as well as cultural and aesthetic factors are also important factors in assessing landscapes. This is very relevant when assessing consent for a specific development.

For the above reasons, the Council has retained the main thrust of Policy 3B1 as notified, which is to acknowledge the variability of the Basin landscape and the consequential differences in capacity to absorb development without adversely impacting the outstanding natural landscape. However, references to visual vulnerability have been removed and replaced these with the term landscape sensitivity. As a consequence of these changes, the map showing areas of visual vulnerability (included as Attachment C to the notified Section 293 Package) will not form part of the District Plan but will remain as reference material. The explanations to the policy are also amended to reflect this change in emphasis. Consequential changes in rules are addressed in the relevant sections below.

In terms of the changes proposed in the Package which differ from the Court's suggestions and PC13 as originally notified, the first change relates to non-farm buildings in Farm Base Areas. The Court suggested that the status of non-farm buildings in Farm Base Areas should depend on the location of the Farm Base Areas, that is, whether a Farm Base Area was within a low, medium or high visual vulnerability area. The activity status suggested by the Court ranged from controlled to restricted discretionary activity. However, for simplicity and because almost all Farm Base Areas are within areas of high visual vulnerability, the Council initially proposed a single activity status for all non-farm buildings in Farm Base Areas, which was restricted discretionary. The Council has since decided, as discussed above, that it is not appropriate to use the visual vulnerability classification as a basis for determining the status of activities, both because it is a very broad brush approach and because it is only one element of any landscape assessment.

A further matter has arisen from consultation which impacts on the provision of non-farm buildings in Farm Base Areas, namely the need to discourage people from applying for resource consent to

establish these buildings outside Farm Base Areas. Council's response is to provide an easier route for non-farm buildings to establish within Farm Base Areas by making these buildings Controlled activities.

The second change relates to farm buildings outside Farm Base Areas. The Court suggested that in these areas the status of farm buildings be based on the level of landscape visual vulnerability in which the building is proposed to be located i.e. Controlled Activity in low visual vulnerability areas, Restricted Discretionary in medium visual vulnerability areas and full Discretionary Activity in high visual vulnerability areas. The Council no longer proposes to retain the Court's suggested approach based on the level of visual vulnerability. Instead, the Council proposes that all farm buildings outside Farm Base Areas be restricted discretionary activities with the matters of control being external appearance and location within the landscape and lighting as well as being subject to additional standards in relation to size and building separation. The exception to this is that farm buildings in the sensitive environments such as Scenic Viewing Areas, Scenic Grasslands, and Lakeside Protection Areas are non-complying. The restricted discretionary status is considered sufficient to enable an assessment of landscape impacts of farm buildings based on the sensitivity of areas in accordance with the Plan's objectives.

The third change relates to not providing for rural residential subdivision in low visual vulnerability areas. This is considered in detail in the evaluation of Objective 3B(3)(c) above.

Efficiency and Effectiveness

In terms of process there is little difference between a controlled activity and a restricted discretionary activity. In theory applications for both could be notified or an affected person approval required, although this is more likely with a restricted discretionary activity. For an applicant there is therefore potential for greater costs and time involved if the activity status is restricted discretionary.

With regard to effectiveness, Council has more options in managing the scale, design and location of a non-farm (residential or accommodation) buildings under restricted discretionary activity status as there is the power, if needed, to decline consent. If a building is a controlled activity there can be a legal issue as to the extent that a council can request changes to a building, including a change in location.

A further consideration is that almost all the Farm Base Areas are within High Visual Vulnerability areas. To be effective in maintaining the outstanding natural landscape it is considered appropriate that the Council has the power to decline consent if necessary, rather than non-farm buildings being established which individually or cumulatively have adverse visual or landscape effects over time.

However, the Council wishes to ensure that there is an effective regime overall for non-farm buildings, not just within Farm Base Areas. Responses received by Council from various parties during consultation indicate that making it easier to establish within Farm Base Areas is likely to reduce the demand for sites outside. This is potentially very positive in terms of the effectiveness of the policy to minimise the building development in the general Basin area due to its outstanding natural landscape values.

5.2 SCENIC GRASSLANDS/TUSSOCK GRASSLANDS

The Court in the First Decision stated that there are relatively small tussock covered flats and hillsides which may not be in the foreground to distant views (unlike Scenic Viewing Areas identified on the Planning Maps) but which are in themselves important aspects of the overall outstanding natural landscape. Some of these areas are adjacent to the road and they are often found on both sides of a road. The Court directed that these areas, which it refers to as *Scenic Grasslands*, be identified. The Court also uses the term *tussock grasslands* as a reference to native tussock grassland species.

The Scenic Grasslands have been identified and are shown on the plans attached to the Section 293 Package as **Attachment C**.

In its First Decision, the Court suggested a Policy (3B8) relating to these areas and to the existing Scenic Viewing Areas identified on the Planning Maps of the Operative Plan. The Council proposes to vary this policy slightly. The table below contains the two versions of the policy.

Environment Court Suggested Policy 3B8	Council - s293 Package Policy 3B7 Views from State Highways and Tourist Roads
(a) <i>To avoid all buildings, other structures, exotic trees and fences in the Scenic Grasslands listed in Appendix X and in the Scenic Viewing Areas;</i>	(a) To avoid all buildings, irrigators and exotic trees in the Scenic Grasslands and in the Scenic Viewing Areas;
(b) <i>To require buildings to be set back from roads, particularly state highways, and to manage the sensitive location of structures such as large irrigators to avoid or limit screening of views of the outstanding natural landscape of the Mackenzie Basin;</i>	(b) To require buildings to be set back from roads, particularly state highways, and to manage the sensitive location of irrigators to avoid or limit screening of views of the outstanding natural landscape of the Mackenzie Basin;
(c) <i>To avoid clearance, cultivation or oversowing of all tussock grasslands adjacent to and within the foreground of views from State Highways and the tourist roads;</i>	(c) To avoid clearance, cultivation or oversowing of Scenic Grasslands including tussock grasslands adjacent to and within the foreground of views from State Highways and the tourist roads;
(d) <i>To minimise the adverse visual effects of irrigation of pasture adjacent to the state highways or the tourist roads</i>	(d) Subject to Policy 3B13, to minimise the adverse visual effects of irrigation of pasture adjacent to the state highways or the tourist roads.

Clauses (a) and (b) now differ in several ways in both versions. In (a) there is a reference to irrigators in the Council's proposed version, reflecting the Court's declaratory judgement on the status of these irrigators not being structures or buildings. In addition, reference to fences has been removed from the Council's versions reflecting recognition of the important role of fencing and that its character (generally post and wire) does not detract from viewing of the landscape or from its character. Clause (c) of the Court's version refers only to tussock grasslands whereas the Council's version refers to Scenic Grasslands, including tussock grasslands. As the primary purpose of controlling activities and structures within these areas is to retain the current open look and character of dry grasslands of the outstanding natural landscape it is considered that clause (c) is more effective by including all the Scenic Grasslands, not just those in which tussocks predominate. To do otherwise would be to permit clearance of vegetation and cultivation of the Scenic Grasslands that do not contain tussocks, which would be the majority of the Scenic Grasslands.

Council's version of Clause (d) differs by referring to Policy 3B13, which is the Pastoral Intensification policy. This reference has been included for completeness as the two policies are interrelated.

To provide more protection of both Scenic Grasslands and Scenic Viewing Areas the Council proposes that no earthworks or tracking is permitted in these areas other than maintenance of existing tracks. If tracking is proposed then it requires consent as a Discretionary Activity. This control is considered to be an effective and efficient way of addressing potential impacts of these earthworks and therefore to achieve Policy 3B7 (c).

5.3 PASTORAL INTENSIFICATION POLICY AND RULES

The provisions in the Section 293 Package which implement Objective 3B(3)(b) are **Policy 3B13 Pastoral Intensification** and a number of rules. Policy 3B13 is set out below:

Policy 3B13 – Pastoral Intensification

- (1) To ensure areas in the Mackenzie Basin which are proposed for pastoral intensification maintain the outstanding natural landscape of the Mackenzie Basin and meet all the other relevant objectives and policies for the Mackenzie Basin subzone (including Rural Objectives 1, 2 and 4 and implementing policies);
- (2) To avoid pastoral intensification in Sites of Natural Significance, Scenic Viewing Areas, and Scenic Grasslands (including tussock grasslands) adjacent to and within the foreground of views from State Highways and the tourist roads;
- (3) To enable pastoral intensification in Farm Base Areas and of land for which irrigation consent has been granted prior to 14 November 2015, and the effects on the outstanding natural landscape has been addressed through the regional consenting process;
- (4) To manage pastoral intensification elsewhere in order to retain the valued characteristics of the Mackenzie Basin Subzone;
- (5) To take into account any agreement between the Mackenzie Country Trust and landowners which secures protection of landscape and biodiversity values as compensation for intensification of production

Explanations and Reasons:

- Continued pastoral use and extensive runs generally sustain the valued landscapes of the Mackenzie Basin. It is recognised however that to achieve on-going economic, social and environmental viability that it is necessary to provide for further productive farm development.
- There are significant indigenous vegetation values throughout the Basin in addition to those identified as Sites of Natural Significance. Managing pastoral intensification through a consent process will enable appropriate consideration of the impacts of intensification on these values and limit or avoid adverse effects.
- Some structures and systems associated with more intensive farming such as large irrigators or industrial style buildings, when placed in the foreground of views can reduce the scenic values and sense of openness valued within the Basin.
- Pastoral intensification is provided for within Farm Base Areas as these areas are generally already modified such that natural and landscape character can accommodate change without adversely impact the outstanding natural landscape of the Mackenzie Basin.
- A number of consents for taking of water and irrigation have been granted by Environment Canterbury for properties within the Basin, many of which are yet to be implemented. Although the natural and landscape values within some of these areas are significant, it is unreasonable to require additional consents through the District Plan for pastoral intensification within those areas as considerable time and expense has been involved in obtaining these irrigation consents. It is also understood that landscape considerations have been taken into account in granting these consents.

This first subsection in this policy refers to pastoral intensification maintaining the outstanding natural landscape of the Mackenzie Basin and meeting all the other relevant objectives and policies for the Mackenzie Basin subzone (including Rural Objectives 1, 2 and 4 and implementing policies). The reference to meeting Rural Objectives 1 – Indigenous Ecosystems, Vegetation and Habitats, 2 – Natural Character of Waterbodies and their Margins and 4 - High Country duplicates the preamble in Objective 3B(3)(b) and could therefore be considered unnecessary in the policy. The requirement to take these matters into account in managing pastoral intensification, however, is important if all relevant values, and not just landscape values, are to be provided for. Reinforcement of these issues and values is considered worthwhile at policy level to achieve Objective 3B(3).

Subsection (2) of Policy 3B13 refers to avoidance of pastoral intensification in more sensitive environments, namely Sites of Natural Significance, Scenic Viewing Areas and Scenic Grasslands adjoining state highways and tourist roads and is based on the Court's suggested Policy 3B13 contained in the First Decision. This element of the Policy does not draw directly on Objective 3B, rather its purpose is to support Policy 3B7 Views from State Highways and Tourist Roads and Operative Rural Objective 1-Indigenous Ecosystems, Vegetation and Habitats and its supporting policies. Pastoral intensification is already tightly controlled in Sites of Natural Significance under the Operative Plan and this new policy and the revised rules reinforce this. In particular proposed Rule 15A.3.2 specifies that all pastoral intensification in Sites of Natural Significance, Scenic Viewing Areas and Scenic Grasslands is a non-complying activity.

A rule is required to control pastoral intensification in these sensitive environments if Objective 3B(3) is to be achieved. The question then is whether non-complying status is the most effective status for this rule. Any status less than non-complying would indicate that pastoral intensification in these areas would be acceptable in many cases. As these areas are considered to be the most sensitive to change because of their inherent values and/or the values prized by the public it is unlikely that pastoral intensification would be acceptable. Non-complying status is therefore considered appropriate.

Subsection (3) of Policy 3B13 seeks to enable pastoral intensification in Farm Base Areas and in areas which have existing irrigation consents, provided the effects on the outstanding natural landscape have been addressed through the regional consenting process. In addition, protection of the values of waterways and their margins is to be achieved by requiring pastoral intensification to be setback from rivers and wetlands. Pastoral intensification in these areas is provided for in proposed permitted activity Rule 15A.1.2. These provisions support and provide for pastoral intensification as expressed in Objective 3B(3)(b) which is addressed in Section 4.1 of this Report. Accordingly, this part of Policy 3B13 and the permitted activity rule are considered to be the most efficient way of achieving the Objective.

Subsection (4) of Policy 3B13 addresses pastoral intensification in the remainder of the Basin, i.e. areas other than Farm Base Areas, consented areas and the most sensitive environments. Council proposes that in these areas, pastoral intensification will be a discretionary activity. This activity status enables the Council to consider all aspects of the proposal that could affect the natural and landscape values of the Basin and if necessary decline consent. This approach is in keeping with proposed Objective 3B(3)(b) which states that pastoral intensification in these areas is to be managed.

Since preparing this S293 Package the Mackenzie Country Trust has been formed which has the purpose of protecting, by negotiation with landowners, priority areas for biodiversity and tussock restoration purposes. The Council understands that as part of its work, the Trust is likely to enter into covenants with landowners that provide for increased protection of tussock grasslands and other important biodiversity values compensated for by intensification of production elsewhere on a property. While it is not known at this stage how these arrangements will work out and how production and protection values are to be balanced, the Council considers it is appropriate that the potential for these covenants to achieve positive outcomes should be recognised in the pastoral intensification policy. Subsection (5) provides for this to occur.

A potential consequence of the approach to pastoral intensification is that over large parts of the Basin any form of pastoral intensification will require consent. This could have substantial cost implications for landowners wishing to further develop their land to meet current market demands for produce, particularly if consent cannot be obtained. There will also be additional cost and time involved in obtaining consent under the District Plan. However, there are a number of factors which may reduce the impact of this control.

Firstly, a significant number of landholdings in the Basin have already sought and obtained rights to irrigate from ECan. In most cases these consents will provide the landowner with an exemption from needing land use consent under the Mackenzie District Plan. Secondly, the water resources from which irrigation would be sourced are limited in number or by allocation limits specified in regional water plans. A third factor is the relatively new nutrient limits in regional plans and in discharge consents which effectively restrict future intensification.

Discretionary activity status as proposed will allow the Council to consider all relevant factors, including consistency with regional plan and consent limitations. The Council is keen to consider integration with regional planning and consenting processes where possible, which will assist in minimising costs for landowners.

Two additional changes to rules are proposed by the Council, which are related to pastoral intensification. The first is the inclusion of irrigation within the definition of pastoral intensification as it applies in the Mackenzie Basin. While the Court proposed the definition of pastoral intensification be amended to include both cultivation and direct drilling, which have direct impacts on the vegetation cover, it did not address the impact of irrigation. Council considers that while irrigation is not a direct effect, the consequences of irrigation can have a dramatic impact on vegetation cover. In particular irrigation can effectively remove all indigenous vegetation and create a monoculture cover with pasture grasses. It is therefore considered that to not include irrigation in the definition of pastoral intensification would mean a very important contributor to pastoral intensification is not subject to the District Plan rules. As such the rules would not be effective in enabling the Council to manage pastoral intensification to limit impacts on the outstanding natural landscape of the Mackenzie Basin as required by the objectives and policies.

A second change is removal of “subdivisional fencing” from the definition of pastoral intensification. This has been done to reflect the positive role of such fencing in improved pasture management without associated adverse impacts on landscape values. Requiring consent for fencing in these situations is not considered to be either effective or efficient.

Associated with pastoral intensification and irrigation are irrigators. Following the Court's declaration that these do not fall within the definition of building in the Operative Plan, the Council proposes specific controls on irrigators so that adverse visual impacts of these can be managed through a consent process. Again this control is considered to be an effective and efficient way of achieving PC13 objectives and policies to protect the outstanding natural landscape of the Mackenzie Basin.

5.4 SUMMARY OF POLICY AND RULE ASSESSMENTS

The following table summarises the costs and benefits of the policies and rules proposed in Council’s section 293 package and provides a consequential assessment of the effectiveness and efficiency of these provisions in achieving the purposes of the RMA as compared to the provisions in PC13 as notified. This comparison is based on the direction of the Court in its Ninth decision⁹. The table also contains an assessment of the risk of “acting or not acting if there is insufficient information about the subject matter of the policies, rules or other methods” as required by section 32(4)(a).

Provisions	Costs	Benefits	Effectiveness and efficiency	Risk of Not Acting
<p>Development within Farm Base Areas (FBA) PC13(N)¹⁰ Policy 3E - Limitations on Residential Subdivision and Housing Rules – Farm buildings: Permitted, Non-farm buildings: Controlled</p> <hr/> <p>S293 Policy 3B3 Development within Farm Base Areas and Policy 3B2(2) Subdivision and Building Development. Rules – Farm Buildings: Permitted; Non-farm buildings: Controlled</p>	<p>Potential visual impact of buildings on the Outstanding Natural Landscape (ONL) values as consents not able to be declined and no control on farm buildings. Time and cost of consenting process for landowners wanting to establish non-farm buildings</p> <hr/> <p>Potential visual impact of buildings on the ONL values as limited control on farm buildings. Time and cost of consenting process for landowners wanting to establish non-farm buildings</p>	<p>Control of the appearance and location of non-farming buildings to limit possible adverse visual impacts. No cost for landowners to establish farm buildings as no consent required.</p> <hr/> <p>Control of the appearance and location of non-farming buildings to limit possible adverse visual impacts, with ability to decline consent if necessary. No cost for landowners to establish farm building. Enabling non-farm buildings in FBAs in intended to discourage proposals to establish them outside FBAs, potential benefit for majority of the Basin.</p>	<p>Has a good level of efficiency and a reasonable level of effectiveness as provides a means to manage built development in existing homestead areas but does not provide for consents to be declined if needed to protect the ONL.</p> <hr/> <p>Has a good level of efficiency and reasonable level of efficiency as provides a means to manage built development in existing homestead areas but does not provide for these to be declined if needed to protect the ONL. Unsure how effective this approach will be in terms of limiting applications for non-farm buildings outside FBAs, especially as some properties do not have FBAs and so will have to apply as a non-complying activity.</p>	<p>Have sufficient information to understand risks.</p> <hr/> <p>Have sufficient information to understand risks but not necessarily to quantify benefits.</p>
<p>Farm buildings outside FBAs PC13(N) Policy 3J - Remote Farm Buildings Rules – Farm buildings: Controlled</p> <hr/> <p>S293 Policy 3B1 Recognition of the Mackenzie Basin’s distinctive characteristics and Policy 3B2(2) Subdivision and Building Development Rules – Non-complying in SVA, Scenic Grasslands, SONS and Lakeside Protection Areas Restricted Discretionary in remainder of Subzone outside FBAs</p>	<p>Potential visual impact of buildings on the ONL values as no ability to decline consent for large or obtrusive farm buildings. Time and cost of consenting process for landowners wanting to establish farm buildings</p> <hr/> <p>Reduced potential visual impact of farm buildings on the ONL values as have ability to place conditions on or decline large or obtrusive farm buildings depending on the landscape sensitivity of the site and vicinity. Time and cost of consenting process for landowners wanting to establish farm buildings</p>	<p>Some control of the appearance and location of farm buildings to limit possible adverse visual impacts.</p> <hr/> <p>Full control of the appearance and location of farm buildings to limit possible adverse visual impacts including the ability to decline consents if necessary.</p>	<p>Has a good level of efficiency in terms of consenting and a reasonable/ poor level of efficiency as a means of managing large farm buildings which impact on ONL values.</p> <hr/> <p>Has a good level of efficiency and efficiency as have a single rule which provides a means to manage, and if necessary decline, farm buildings outside FBAs. Any assessment will be based on the detailed landscape sensitivity of the site and area rather than on the broader classification of visual vulnerability</p>	<p>Have sufficient information to understand risks.</p> <hr/> <p>Have sufficient information to understand risks.</p>

⁹ Ninth Decision, para 35

¹⁰ Plan Change 13 as notified in December 2007

Provisions	Costs	Benefits	Effectiveness and efficiency	Risk of Not Acting
<p>Rural- residential development in areas of lesser landscape sensitivity outside Farm Base Areas.</p> <p>PC13(N) Policy - 3G Approved Building Nodes Rules – Non-complying for single building or Discretionary for a new building node with extensive criteria to be satisfied</p> <p>S293 Policy 3B4 Residential and Visitor accommodation Rules- Non-Complying/require Plan Change</p>	<p>Significant time and cost involved in obtaining consent for development(s).</p> <p>-----</p> <p>Significant time and cost involved in obtaining rezoning for rural residential subdivision and development.</p>	<p>Visual impacts of rural residential development (as a single building or group) will be assessed in detail to ensure only approved if does not adversely impact ONL values.</p> <p>-----</p> <p>Visual and all other impacts of rural residential development will be thoroughly assessed through a plan change process</p>	<p>Has a reasonable level of efficiency as there will be a comprehensive assessment but it will be at considerable cost to the applicant and the Council. Has a good level of effectiveness.</p> <p>-----</p> <p>Has a reasonable level of efficiency as there will be a comprehensive assessment but it will be at considerable cost to the applicant and the Council. Has a good level of effectiveness.</p>	<p>Have sufficient information to understand risks.</p> <p>-----</p> <p>Have sufficient information to understand risks.</p>
<p>Protection of Scenic Grasslands, Scenic Viewing and Lakeside Protection Areas</p> <p>PC13(N) Policy3O- Views from Roads Policy 3K- Lakeside Areas Rules - No new rules for Lakeside Protection Areas or Scenic Viewing Areas (SVA) (existing rules in operative District Plan)</p> <p>S293 Policy 3B7 – Views from State Highways and Tourist Roads Rules – Tree planting in these areas are Discretionary; Buildings, irrigators, pastoral intensification, earthworks, mining and subdivision in these areas are Non-complying.</p>	<p>Adequate protection of Scenic Viewing Areas but poor level of protection of Scenic Grasslands which are frequently viewed by people travelling through the Basin</p> <p>-----</p> <p>Economic cost of limiting productive use of some land bordering main routes in Basin. Time and cost involved in obtaining consents for buildings, other works and pastoral intensification.</p>	<p>Greater flexibility in use of land adjoining main roads.</p> <p>-----</p> <p>Greater protection of land cover adjoining roads to retain open dry grasslands which are a feature of the Basin.</p>	<p>Has a poor level of effectiveness and efficiency as will not protect important views of the ONL.</p> <p>-----</p> <p>Has potentially a good level of efficiency and effectiveness in protecting ONL if controls are understood by landowners as noncomplying status is likely to be significant deterrent.</p>	<p>May not have sufficient information to understand the actual costs of these limitations on landowners but ONL and ecological values justify controls.</p>
<p>Pastoral Intensification</p> <p>PC13(N) Policy - None Rules –Only limit is with Sites of Natural Significance (SONS)</p> <p>S293 Policy 3B13 - Pastoral Intensification and Policy3B1 – Recognition of the Mackenzie Basin’s distinctive characteristics Rules - Pastoral intensification: Permitted in FBAs and within areas already consented for irrigation, Non-complying in SVAs, Scenic Grasslands and SONS and Discretionary elsewhere.</p>	<p>Potential for significant adverse impacts on the Basin’s ONL and ecological values.</p> <p>-----</p> <p>Economic cost of limiting future productive use of significant land area within the Basin. Time and cost involved in obtaining consents for pastoral intensification.</p>	<p>Greater options for intensification of production for landowners.</p> <p>-----</p> <p>Reduced potential for intensification to replace dry grassland and low intensity pasture in a manner which adversely impacts on the specific landscape and ecological values of the Mackenzie Basin.</p>	<p>Has a poor level of effectiveness and efficiency as will not protect important values of the ONL associated with land cover and lack of intensive farming.</p> <p>-----</p> <p>Has a reasonable level of effectiveness and efficiency as will protect important values of the ONL associated with existing land cover and lack of intensive farming on land that is not within FBAs and for which no irrigation consent has been granted.</p>	<p>Insufficient information on the ecological values of much of the Basin so having to act on generic information base. Potential impacts on these values are considered a sufficient risk to justify closely managing pastoral intensification in much of the Basin.</p>

ATTACHMENT A – ENVIRONMENT COURT SECTION 32 COMMENTS

The following text contains extracts from the Environment Court’s First, Sixth, Seventh, Eighth and Ninth Decisions commenting on matters relevant to section 32 evaluation of Plan Change 13.

First Decision¹¹

[235] Since the Environment Court has the same power, duty and discretion in respect of a decision appealed against as the local authority that made the decision, the court must carry out an analysis under section 32 of the RMA.

[236] We have already analysed the extent to which each of the objectives put forward or reworded by us achieve the purpose of the RMA so we need to consider the objectives no further at this stage. We now have to examine whether having regard to their efficiency and effectiveness, the policies, rules and other methods before us are the most appropriate. We must take into account:

- (a) the benefits and costs of policies, rules or other methods;
- (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.

Benefits and costs

[237] The benefits and costs which need to be taken into account under section 32 include those given by or imposed on the following activities and/or people:

- the provision of housing (outside Tekapo and Twizel townships);
- the Waitaki Power Scheme;
- farming;
- potential carbon forestry under emissions trading schemes and conventional production forestry;
- tourists and the tourism industry;
- residents of the basin;

- to the extent that the benefits and costs relate to the objectives and ultimately the purpose of the Act. Any benefits arising from the policies that do not further the objectives should be disregarded. Any potential costs imposed by activities that do not achieve the objectives should be avoided as reducing the efficiency and effectiveness of the policies.

[238] We did not receive any quantified evidence on the benefits and costs of the various proposed policies. While such an analysis was desirable the courts obligation in its absence is to consider all the evidence we have received and make our decision on that evidence: see *Takamore Trustees v Kapiti Coast District Council*, cited with approval and expanded on in *Contact Energy Limited v Waikato Regional Council*.

[239] We take into account the following matters. First, subdivision for housing away from the urban areas would have some benefits to the district compared with subdivision within or adjacent to the

¹¹ [2011] NZEnvC 387.

existing urban areas. (It is the marginal benefit of these housing options over the alternatives that is relevant.)

[240] In fact the only benefits we can think of are from the increase population that might be attracted by the different type of housing available – bach-type accommodation in farm base areas, or mountainous rural-residential lots with some space and privacy. Such subdivision would also create some costs, given that the presence of buildings, particularly residential units and associated domestication, is one of the major reducers of naturalness in a landscape. However it is obvious that the benefits of more housing outside the existing urban areas can be largely retained while the costs are minimised by confining residential units to places where there are likely to be few adverse effects.

[241] It is easier to see that in a few special places – such as Pukaki Downs – where visitor accommodation with a distant view of Aoraki/Mt Cook could be obtained there would be benefits to visitors and landowners and – on those locations – minimal costs to landscape values.

[242] The importance of the Waitaki Power Scheme to New Zealand as a whole suggests that within its existing footprint (including Lakes Tekapo and Pukaki) the operators should be left to manage their operations with as much flexibility as possible as stated in Objective 3B. The policies are worded so as to achieve that. Further, in relation to the hazards issue, if there was not to be a policy preventing residential units or farm bases in the flood hazard areas the evidence for Meridian is that it would increase the Potential Impact Classification (“PIC”) of the relevant upstream sections of the canal. That might necessitate upgrade of the existing infrastructure in order to reduce the PIC. Even evaluations of how to reduce the PIC can cost hundreds of thousands of dollars. Actually carrying out strengthening could require ‘...land purchase and construction of earth fill buttressing of the (existing) canal embankment’ and by implication far larger costs.

[243] We can see that PC13(N) and all the subsequent versions so far would enable freehold farmers to make some one-off profits by selling off relatively small pieces for residential units. If these profits are reinvested in farming operations it may increase the productivity of farming in the district. While there may be short term benefits to landowners and lessees, we are concerned that the long term adverse effects to values of national importance under section 6(b) will be greater. There are of course other section 6 values the effects on which we cannot assess at this stage.

[244] As for the benefits and costs of higher intensity (irrigated) farming, we received no evidence about this. We are aware of a Ministry for the Environment report on the issue which, in 2005, recorded that an analysis of the economic impacts of using 14.7cu.m/s of water for irrigation in the Upper Waitaki rather than for power generation had the following results:

- The options for irrigation using the quantity of water specified in the former Order in Council produce considerable surplus in terms of net benefit from agricultural production
- However when the opportunity costs of hydro-generation are taken into account, the results are negative overall in all scenarios using base case assumptions
- The negative outcome is worsened by the inclusion of additional hydro-generation in the lower Waitaki which effectively increases the opportunity cost of water extracted for irrigation.

We can put no weight on that report but mention it for two reasons. First we are concerned about some potential natural justice issues for the Canterbury Regional Council. The process by which this water has been re-allocated from Meridian, which according to the High Court in *Aoraki Water Trust v Meridian Energy Ltd* has all the water in the Upper Waitaki (and more) allocated to it, to local aspiring irrigators is completely obscure to us. That is not our business in these proceedings, but we are aware from other appeals lodged with the Registrar of aspiring irrigators in the lower Waitaki who should have been made aware (if they are not) that irrigation in the Upper Waitaki is likely to mean less water for them. Secondly, assuming the cost benefit analysis is in favour of using the water for the Waitaki Power Scheme, then the rational course would be for Meridian and/or the Government to find a mechanism to compensate the Upper Mackenzie Basin farmers who have the imputed water permits so that the water stays within the Waitaki Power Scheme at all times it is needed for generation or to refill lakes but taken for downstream irrigation when surplus. At present the free water to the Mackenzie farmers appears to be creating a perverse incentive to damage some landscape values. (We accept there is also a benefit, at least potentially, by making productive some desertified near wasteland).

[245] We recognise that the spreading of wilding exotics produces positive as well as negative externalities. The positive is the absorption of CO₂. The negatives include the adverse effects of wilding exotics on the landscape and ecological values of the Basin. Freeholding of land and registration of an emissions trading scheme by the owner (as on Pukaki Downs) will eliminate the positive externality because the landowner would receive payment for the measured carbon capture under the particular ETS for his or her land. At present the size of the positive externality is limited because many pastoral lessees and other landowners are removing the wildings on their land. Pastoral lessees have an obligation to do so. Those actions also limit the size of the negative externalities – there are the adverse effects of wilding exotics on landscape and on ecosystems. After entry into the emissions trading scheme the positive externality will be eliminated but the marginal public benefit of carbon capture (net of payments for carbon credits to landowners) may increase because the possibility of payments under an ETS is likely to encourage an increase in the spread of wildings. Thus the negative externalities may also increase unless the areas where wildings may spread are chosen carefully, and enforceable controls are put in place to ensure wildings do not spread where they should not. One difficulty with all this is that while the public benefits of carbon capture by wilding trees under an ETS are (at least in theory) easy to measure (value of carbon captured minus carbon credits paid out) the costs in terms of the effects on the value of the landscape are notoriously difficult to measure. No attempt to do so was made in these proceedings.

[246] At present the cost of managing wildings ultimately come back to the landowner and for much of the Mackenzie Basin that is ultimately the Crown through LINZ. The benefits are available for all to enjoy, as well as accruing to the landowner in increased production. Since the lessee has an obligation under each pastoral lease to manage wilding exotics (as weeds) that cost is (or should be) reflected in the rent that a reasonable lessee is willing to pay. So the cost is ultimately borne by the Crown – even if the sweat is the farmer's - so that responsibility and cost needs to continue with whoever acquires the freehold. Similarly we consider the costs of wilding control should be borne in value proportions by all subsequent landowners of the subdivided land. If pastoral lessees and freeholders know that under the district plan they will have to bear the full costs of wilding control then that should effect what land they seek to keep in their possession and the amounts to be paid by the Crown to pastoral lessees in the exercise or for freehold land on subsequent sale.

[247] The costs and benefits of the policies to the tourism industry have not been quantified either. However given the importance of tourism to the district economy we consider changes to the landscape of the Mackenzie Basin should be managed carefully.

[248] In summary we consider the policies we have provisionally settled on are closer to those “justified” by the Council’s section 32 report (dated 13 December 2007) than those agreed on or proposed by the parties, and are the most appropriate policies for achieving objective 3B and the other objectives in chapter 7 of the district plan.

Explanations

[249] Many of the explanations in PC13(C) should be carried over with minor changes. Some of course will require greater amendment.

Risks

[250] As for the risks of acting or not acting, we agree with the Council’s section 32 report that “There is a real risk that if action is not taken soon that some very important landscape [...] could be degraded by some very inappropriate development and subdivision”. Further, the operative district plan and PC13(N) raise the probability of degradation to the landscape (and also potentially ecosystems) from further areas of intensified farming activities. We consider PC13 barely did enough to reduce the risk of buildings having adverse effects on the landscape; and it did little or nothing about the risks of wildings and intensified farming activities. We tentatively consider that PC13(C) and/or the relief suggested by the parties moves considerably too far back towards the near *laissez-faire* approach of the operative district plan. We consider the risks of not acting are much greater than the risks of proposing amended policies and hearing the parties (and potentially others as new section 274 parties) on them. That is particularly so in respect of wilding exotics: given the high probability of further rapid growth of wilding exotics in much of the Basin on our current state of knowledge, we consider the risk of not acting to manage conifers is higher than the risk of leaving wildings free to spread.

[251] In summary, if we take no action in respect of the issues raised there is a strong chance that the Mackenzie Basin’s landscape values will be strongly adversely affected. If we take some judicious action then those values will be affected but, we judge, in a way that largely retains the landscape’s character. In terms of risk the important point is that if we are wrong, little harm has been done. The district plan can be unwound and further development allowed at a later stage if the evidence warrants it. The opportunity costs of not acting are very high, those of acting are relatively low.

Sixth Decision¹²

[50] The effect of the 2005 Amendment Act appears to be that there is now a two stage process:

- (1) the court decides whether to confirm, amend, or cancel the decision or the provision or matter appealed. Cancellation appears to have the effect of reinstating the council’s notified provision or of inserting a provision sought by a submission, and appeal, or of deleting a

¹² [2013] NZEnvC 257.

provision as sought by a submission and appeal. As a part of that the court may be able to exercise a clause 10(2) power to amend a local authority decision.

- (2) if the court decides that the outcome of the first stage is not the most appropriate provision under section 32, then it may exercise its discretion under section 293 to direct the council to come up with amendments that are. Such directions are not necessarily alternatives to the section 290 orders but may be supplementary to it.

Seventh Decision¹³

[18] Normally it would be appropriate for the local authority to briefly update its section 32 evaluations in respect of the amendments proposed by the court so that they can be considered when deciding whether or not to confirm the changes. Both that and the Council's proposed wording would be open for challenge by the parties as not complying with the relevant test under section 32 and/or not complying with the court's directions.

[43] Another important part of the scheme of the RMA is that every provision in a plan or plan change must be evaluated under section 32. The requirements are (relevantly):

...

- (3) An evaluation must examine -
- (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
 - (b) whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.
- (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account -
- (a) the benefits and costs of policies, rules and other methods; and
 - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.

[44] Section 32A then states

32A Failure to carry out evaluation

- (1) A challenge to an objective, policy, rule, or other method on the ground that section 32 has not been complied with may be made only in a submission under Schedule 1 or a submission under section 49.
- (2) Subsection (1) does not preclude a person who is hearing a submission or an appeal on a proposed plan, proposed policy statement, change, or variation, or a submission on a national policy statement or New Zealand coastal policy statement, from taking into account the matters stated in section 32.

Section 32A(1) shows that failure to carry out a section 32 analysis is not a jurisdictional bar to a plan or plan change being heard by a local authority or the court. Section 32A(2) provides that subsection (1) does not preclude the court from carrying out its duty to undertake an evaluation of the provisions in a proposed plan or change.

[45] That has implications for the court when considering whether to give directions to the local authority under section 293. The more removed these directions are from the provisions in the

¹³ [2013] NZEnvC 258.

notified plan the less the section 32 evaluation for the latter is likely to be accurate. However there are two other aspects of the RMA's scheme which reduce concerns about that. First the different types of evaluations required under section 32 needs to be borne in mind. The evaluation of an objective under section 32 does not raise cost-benefit issues. It is a more general enquiry as to whether an objective is the most appropriate way to achieve the purpose of the RMA. In this case I hold that consultation by the council would be sufficient for it to check that an objective along the lines suggested by the court meets the purpose of the Act. Secondly a local authority may be directed to prepare further section 32 analysis in respect of the amended policies and/or methods it draws up. That can be tested at the confirmation hearing.

[48] Section 293 gives the court powers to resolve the situations where if, after considering all the relevant factors, it becomes apparent on the evidence and/or on the face of the local authority's decision that:

- In order to achieve the purpose of the RMA an objective not sought in any appeal is the most appropriate objective in terms of section 32 RMA because that objective recognises and provides for a section 6 matter of national importance or takes account under section 8 of the principles of Te Tiriti o Waitangi;
- A policy not sought by any appeal is most appropriate in order to implement an objective having regard to its efficiency and effectiveness compared to the alternatives including the status quo;
- An objective may have been amended under section 290(2) but then consequential amendments to policies and methods (not sought by any submission but related to it) may be found by the court to be the most appropriate solutions under section 32 of the Act. Usually the answer is that a differently worded objective or policy will come within the range of possibilities permissible under the "fair and reasonable in all the circumstances" principle set out by the Full Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* and extended slightly with the addition of clause 10(2) of the RMA in 1996. But the section 293 powers are very useful especially where there are concerns over the fairness of the process.

[49] Another situation where section 293 may be used is where the local authority has made an error of law or has substantially failed to carry out one of its duties under the RMA or under a statutory instrument. Examples of such an error might be:

- ...
- Misapplication of section 32 by comparing incorrect options (e.g. not comparing the effects of the proposed changes provision with the effects of the status quo).

Eighth Decision¹⁴

[21] ...Logically the objectives must be settled before the policies to implement them are resolved.

[22] That approach is reinforced by section 32 of the RMA in all its recent incarnations. Section 32 requires that the objectives must (now) be evaluated as to whether they are the most appropriate way to achieve the purpose of the RMA. The other provisions must then be examined to ascertain

¹⁴ [2013] NZEnvC 304.

whether they are the most appropriate way to achieve the objectives. It is impossible to ascertain whether a particular policy is the most appropriate way to achieve objective(s) unless one knows what the objectives are.

Ninth Decision¹⁵

[30] The High Court directed that "...a new section 32 report is required and will need to be commissioned by the Council'. Regrettably there are some differences as to how to implement the High Court decision in relation to section 32. Counsel for Federated Farmers submits that:

Following preparation of the section 32 report, the entire plan change must be re-notified. We interpret this to mean PC13 as a whole, rather than only the new objectives, policies and rules (or other methods) prepared by the Council in consequence of the directions.

Other parties may have a different view on the interpretation of the High Court orders. If there is disagreement over what the High Court orders require, then a hearing may be necessary to resolve this.

[31] Counsel for Mackenzie District Council submits that:

The High Court directions do not mandate an opening up of the whole PC13 for re-notification and submission; nor require that a full section 32 report be prepared for PC13 as a whole.

The High Court's direction is to ensure that the changes prepared by the respondent are publicly notified. The reference to the entire plan is to enable the changes to be assessed in context.

I consider Mr Caldwell's submission is correct.

[32] I now refer to the requirements of section 32. In its applicable form section 32 stated (relevantly):

32. Consideration of the alternatives, benefits and costs

- (1) In achieving the purpose of this Act, before a proposed plan, ...change, ...is publicly notified, ...an evaluation must be carried out by:
 - ...
 - (c) the local authority, for a ...plan ...
- (2) A further evaluation must also be made by:
 - (a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
 - (b) ...
- (3) An evaluation must examine:
 - (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
 - (b) whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.
- (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account:

¹⁵ [2014] NZEnvC 246.

- (a) the benefits and costs of policies, rules and other methods; and
 - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.
- (5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.
- (6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.

[33] I am concerned that the section 32 issues may get out of hand. I am quite sure that the High Court did not intend to impose anything onerous on the Council and in particular I consider it is within the Council's authority to "commission" an evaluation from its own staff if they wish to avoid the expense of consultants.

[34] In passing, it may be useful to record, because the High Court does not seem to have been referred to this that section 32A states:

32A Failure to carry out evaluation

- (1) A challenge to an objective, policy, rule, or other method on the ground that section 32 has not been complied with may be made only in a submission under Schedule 1 or a submission under section 49.
- (2) Subsection (1) does not preclude a person who is hearing a submission or an appeal on a proposed plan, proposed policy statement, change, or variation, or a submission on a national policy statement or New Zealand coastal policy statement, from taking into account the matters stated in section 32.

In the light of that section the High Court may, with respect, possibly be wrong to impose an obligation on the Council for a further section 32 report on proposed changes to a plan change. The obligation for a Council to prepare such a further report on changes was only introduced on 3 December 2013. There may be a duty on the Environment Court to carry out a section 32 analysis and as a matter of practice the court regularly analyses changes and variations under section 32 RMA. In fact as I have said in these proceedings, the Environment Court had already carried out a section 32 analysis in the first decision and I return to that shortly.

[35] In any event, those observations are irrelevant to the orders I need to make. This court and the parties are bound by Gendall J's direction so my suggestions on the section 32 procedure are now set out. To start, I observe that the new section 32 report required of the Council under section 32 is not as broad in scope as might initially appear from Gendall J's language. In my view the section 32 report only has to cover matters to the extent that the Council's proposed objective(s) and policies differ significantly from those in PC13, as notified or as suggested, tentatively, by the Environment Court. The policies in PC13 which are substantially unchanged already have their own section 32 evaluations which are beyond challenge.

[36] Further, in respect of any amended policies on which the Council wishes to adopt the court's wording, the courts Reasons in the First and subsequent Decisions suffice for three reasons. First, despite receiving little evidence directly on section 32 the Environment Court dedicated a section – part 4.13 – of that decision to a specific section 32 analysis. Of course in a wider sense, the whole of that decision is a section 32 evaluation. Second, a section 32 evaluation needs to contain a level of detail that corresponds to the scale and significance of the effects that are anticipated for the proposal. Ideally I would hope that a proper cost benefit analysis would objectively steer the Council

in the right direction. However no one has yet come up with a method for comprehensively valuing a nationally important outstanding natural landscape or the effects of different types of development on it. I would not expect the Mackenzie District Council to try now. So it is likely to be thrown back on its value judgement as to how to give effect to objectives 3A and 3B(1) and (2) when developing an objective 3B(3) – if any – and the implementing policies and rules. In effect the justification for any changes in the property rights of farm owners or lessees is likely to be on the principle of reciprocal enhancement of some of the rights of all land owners in the Basin, and reduction of other rights of all land owners in order to protect the recognised outstanding natural landscape. Third there is no general challenge to the adequacy of a section 32 evaluation: section 32 RMA. I am neither trying to subvert the High Court decision here nor to undermine the Environment Court's own decisions – simply observing that the Council may choose for itself the level of detail it wants to put forward. There is an important issue of proportionality here.

[37] This division of the Environment Court may have been 'poorly equipped' to carry out a section 32 evaluation but the fact remains that the court did carry out such an analysis specifically in part 4.13 of the First Decision and generally in the decision as a whole. The Environment Court's jurisdiction was in section 32A which indirectly gives the court discretion to have regard to section 32 matters: in this case the court did so. It is appropriate for the Mackenzie District Council to rely on the court's reasons to the extent it may wish to. I emphasise strongly that the court is not trying to tell the Council what to do, simply suggesting that the Council does not have to cover the same ground if it does not want to.

[38] Where the Mackenzie District Council will need a further section 32 report is on the proposed rules to implement the amended policies. Again though, the extent of that evaluation is basically for the Council.